

July 14, 2004

BY HAND DELIVERY

Kristi Izzo, Secretary
Board of Public Utilities
State of New Jersey
Two Gateway Center
Newark, NJ 07102

Re: Docket No.: TO00060356, *In the Matter of the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.*

Dear Secretary Izzo:

The Division of the Ratepayer Advocate ("Ratepayer Advocate") submits this letter in response to Verizon New Jersey Inc.'s ("Verizon NJ's") and AT&T Communications of NJ, L.P.'s ("AT&T's") oppositions filed on July 7, 2004 and July 8, 2004 opposing the Ratepayer Advocate's request to strike Verizon NJ's and AT&T's reply briefs from the record. Both Verizon NJ and AT&T filed reply briefs in response to the answers filed to the Motions for Reconsiderations.

Both Verizon NJ and AT&T assert that their filing of reply briefs to the answers filed to the Motions for Reconsideration filed in the above referenced proceeding was consistent with the Uniform Administrative Procedure Rules, otherwise consistent with applicable motion practice, and otherwise required under due process.¹

Neither Verizon NJ nor AT&T appear to appreciate that a Motion for Reconsideration under N.J.A.C. 14:1-8.5 of the New Jersey Board of Public Utilities ("Board's") rules is a discretionary action which involves exercise of its legislative judgement as to whether as a matter of law, discretion, or policy it should reopen and modify its initial decision. As such, the matter is not itself a contested case and therefore, the full range of due process is not implicated by the Board's explicit rule that permits only a

¹/ See Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1 et seq.; See N.J.A.C. 1:1-12.2(d) (motion rules).

motion and answer thereto. AT&T's claim that the general provisions of *N.J.A.C. 1:1-12.2(d)* trump the specific provisions contained in the Board's Rules of Practice has no support in law. Absent a specific procedural rule in § 1-8.5 *et seq.* permitting a reply, the Board's Rule of Practice do not permit replies.

Such a rule is eminently reasonable in view of the limited grounds that warrant the Board to reopen a decision. A party is required in its Motion for Reconsideration to support and provide all the reasons for why reopening is appropriate and the opponents provide all the reasons as to why the Board's action were in fact appropriate. Under the Board's rule, replies add nothing to the issues already joined. Since, ultimately, the aggrieved party is free to appeal the decision of the Board, no failure of due process is involved. As noted by the Appellate Division, the processes used must be suitable to the end to be achieved when the Court stated:

What is required in each instance, as a hearing appropriate to the nature of the case, is a proceeding that promotes fundamental fairness and fosters the integrity of governmental processes. The idea embodies concepts which go beyond whether a contested case hearing under the "Administrative Procedure Act (APA) is required and focuses on how governmental functions can best be discharged to engender confidence that the processes used are suitable to the end to be achieved.²

The Board's decision to limit responses to Motions for Reconsideration under *N.J.A.C. 14:1-8.5 et seq.* to an answer otherwise satisfies fundamental fairness and the integrity of the process. AT&T's claim that the Ratepayer Advocate is abandoning its prior position taken during the proceeding on what is the appropriate cost of capital is simply mistaken. The Ratepayer Advocate submits that the cost of capital proposed by the Ratepayer Advocate is and was a rate that the Board could have adopted for the reasons set forth in its testimony and in its initial and reply briefs and if adopted, the Board's decision would be fully supportable and consistent with the evidence and the applicable law. However, the Ratepayer Advocate believes that the Board complied with all applicable law in reaching its determination on the cost of capital for the reasons set forth in the Ratepayer Advocate's answer to the Motions for Reconsideration. As a result, the Ratepayer Advocate asks that the Board strike the replies filed by Verizon NJ and AT&T.

Respectfully submitted

SEEMA M. SINGH, ESQ.
RATEPAYER ADVOCATE

By: _____

² See *In Re Bell Atlantic New Jersey, Inc.*, 342 N.J. Super. 439, 444 (App. Div. 2001).

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cc: Attached Service List (by e-mail and regular mail)